Filed 11/17/09 D.N. v. Superior Court CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

D.N., Sr.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al.,

Real Parties in Interest.

No. B217855
(Super. Ct. No. CK55772)

ORIGINAL PROCEEDING; petition for extraordinary writ. Marilyn Mackel, Commissioner. Petition denied.

Los Angeles Dependency Lawyers, Inc., Law Office of Timothy Martella, Eliot Lee Grossman and Sarah Shon, for Petitioner.

No appearance for Respondent.

Richard E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Senior Associate County Counsel, for Real Party in Interest, Department of Children and Family Services.

No appearance for Real Party in Interest, A.H.

The father of an infant declared a dependent of the juvenile court under Welfare and Institutions Code section 300,[1] raises constitutional and evidentiary challenges to the juvenile court's jurisdictional findings. The father also challenges the juvenile court's order denying reunification services because of his conviction for a violent felony, and the court's refusal to remove the child from the home of the caregivers and prospective adoptive parents with whom he has lived since birth, to place him with paternal relatives. Finding no error and no abuse of judicial discretion, we deny the father's writ petition.

FACTUAL AND PROCEDURAL BACKGROUND

On October 22, 2008, Department of Children and Family Services (DCFS) took temporary custody of newborn D.N., Jr. (D.N.), after his mother, A.H. (Mother), tested positive for cocaine at the time of the child's birth. Mother claimed not to know the identity of D.N.'s father.

In late October 2008, DCFS filed a petition on behalf of D.N., alleging Mother had a history of substance abuse, was currently using cocaine, and had failed to reunify with her three other children, as to whom her parental rights have since been terminated.[2] D.N. was temporarily detained, and placed in the foster home where he remains. Mother was given monitored visitation.

In a telephone conversation with DCFS on December 10, 2008, Mother first identified D.N., Sr. (Father) as D.N.'s father. Father, who participated in that

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[1] All undesignated statutory references are to the Welfare and Institutions Code.

[2] Mother is not a party to this writ proceeding. Accordingly, our factual and legal discussion is limited to matters relevant to Father's writ petition.

conversation, was not sure D.N. was his child and requested a paternity test. The social worker told Father to attend a hearing on December 29, 2008. By the time of that hearing, D.N.'s foster parents had informed DCFS they wanted to adopt the infant. Their adoptive homestudy was approved in March 2009.

Father did not attend the December 29 hearing. He first appeared in mid-March 2009 to request a paternity test. He was ordered to return for that test on March 20, and the adjudication hearing was set for April 16. Father was given monitored visits with D.N.

DCFS investigated Father's background in preparation for the April 16 hearing. DCFS reported that a March 27, 2009 CLETS (California Law Enforcement Telecommunications System) report for Father reflected a conviction in 1981 for "rape with force and threat, sodomy with force, violence, and etc., and oral copulation with force, violence, etc." Father told DCFS the information in the CLETS report was accurate.[3] The CLETS report also reflected that Father is a registered sex offender (apparently as a result of the 1981 conviction), had arrests for domestic violence, battery and grand theft, and convictions for felony drunk driving and forgery. Father spoke only of a single rape conviction, but said it arose from an incident involving prostitutes in 1988 or 1989.[4] He told DCFS his most recent conviction was in 2006 or 2007, for forgery. Father's criminal history also reflected a number of arrests for felony parole violations, resulting in multiple incarcerations.

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[3] Initially, there was some confusion about whether Father's 1981 convictions for sodomy and oral copulation were based on Penal Code provisions involving minors under 14 years old, or those involving force. (See Pen. Code, §§ 288a, subd. (c), 207.) That confusion was eliminated by a letter from the Attorney General. It states that police reports of the crimes reflect that Father's three victims ranged in age from 19–32, so it appears his conviction was premised on his use of force, not the age of his victims.

[4] While on parole in 1997, Father was arrested for raping a female victim "incapable of consent." (Pen. Code, § 261, subd. (a)(1).) He was not convicted of rape, but instead returned to prison to "finish [his] term."

After the paternity test revealed that D.N. was, in all likelihood, his son, Father told DCFS he was "willing to care for" the child. He had two monitored visits with D.N. before the April 16 hearing. The baby cooed and smiled, and Father was attentive and comforting; the visits went well. In mid-April, Father was judicially declared D.N.'s biological and presumed father.

DCFS filed the operative first amended petition (petition) in late April 2009. In addition to the allegations of the petition filed in October 2008, the petition alleged that Mother and Father had a history of engaging in violent confrontations, including an incident during which Father punched Mother in the face with his fist, and another during which he knocked down the door to her residence and threatened to kill her. In addition, the petition alleged Father had a history of forcibly raping, sodomizing and threatening an unrelated female, a history of convictions for rape, sodomy, oral copulation by force, drunk driving and forgery, and was a registered sex offender. The petition alleged further that Father maintains a criminal lifestyle that has resulted in his being incarcerated for 23 of 30 of his adult years. DCFS alleged D.N. was at substantial risk of serious physical and emotional harm or sexual abuse as a result his parents' violence, Mother's substance abuse, and Father's violent criminal history coupled with his status as a registered sex offender.

The CLETS report accompanied DCFS's April 2009 report, as did copies of a number of police reports of Father's arrests, some of which had resulted in convictions. The reports reflect Father's criminal history dating back to 1980, including arrests in:

(1) March 1980, after Father was accused of raping a female victim and burning her with cigarettes. It is not clear from the record whether this is the incident that gave rise to Father's 1981 convictions for rape, sodomy, etc.

(2) October 1992, in which Father argued with the friend driving a car in which Father was a backseat passenger. Father, who had drunk a pint of gin, wanted to drive. When the driver refused to let him, Father began hitting her on the face and body with his fist until she got out of the car. Father then began to drive, all the while hitting the passenger and attempting to push her out of the moving vehicle. After Father stopped the

car and the passenger began running away, Father chased and caught her, and began to pummel her in the stomach with his fists until a bystander came to her aid. Father was arrested for battery.

(3) April 1993, for grand theft auto.

(4) In August 1997, Father lured a female into a hotel room. He followed the victim into the room and threatened to stab her unless she orally copulated him. Father then told the victim he could "shoot [her]. . . head off," and raped her. Father was on parole at the time of this incident. The police report states that Father was arrested for the rape of a victim incapable of consent due to a mental or developmental disability. (Pen. Code, § 261, subd. (a)(1).)

(5) October 2000, when Father and another man verbally sparred over a mutual female friend. Father told the man "I gotta strap and I'm gonna kill you if you don't let me have her!" Afraid for his safety, the man walked away to call the police. Father followed him and threw a brick at him "very hard," from about four feet away, striking him. Father was arrested for assault with a deadly weapon.

(6) December 2000, Father's mother called police to report grand theft by Father, who had an outstanding felony warrant at the time.

(7) December 2006, Father arrived at Mother's residence. He began yelling at her and threatening that, if she refused to open the door, he would get his gun and kill her. Father had threatened Mother in the past. Father kicked in the door, forcing his way partially into Mother's home. When the police arrived, Father fled and the officers were forced to chase him. Mother told police she believed Father would have carried out his threat to kill her. She believed he was willing to kill her and capable of killing or seriously harming her: he had threatened her in the past and been convicted of violent crimes.

(8) November 2007, Father and Mother were living together in a motel. They began to argue, and Father punched Mother in the mouth. Afraid Father would hit her

again, Mother fled from the room, ran to the front of the motel and flagged down the police. Father was arrested for battery on a cohabitant.[5]

When interviewed regarding the allegations of the petition, Father did not recall the circumstances surrounding his arrest in 1997 for rape, nor did he remember ever hitting or threatening Mother. He denied having been convicted of domestic violence, and said he had been convicted only of drunk driving and forgery. At the conclusion of the detention hearing, the court ordered Father to participate in domestic violence, Child Sexual Abuse Program (CSAP) and parenting programs. He was given monitored visits twice each week. DCFS recommended that Father be denied reunification services, based on his status as a registered sex offender and conviction for a violent felony under Penal Code section 667.5, subdivision (c). (§ 361.5, subd. (b)(12).)

Sometime between May and mid-June 2009, Father enrolled in programs for parenting, domestic violence, child abuse and individual counseling. He did not enroll in the court-ordered CSAP program. Between late April and mid-July 2009, Father visited with D.N. on 15 of 18 scheduled occasions. DCFS reported that Father's conduct was appropriate, and he and D.N. had developed a positive relationship. DCFS also reported that D.N. had developed a strong bond with his foster parents, who loved and wanted to adopt him. Father gave DCFS the names of D.N.'s paternal aunt and uncle, as a possible placement for D.N. Their home was approved as a possible placement in mid-July 2009. The aunt and uncle were willing to adopt D.N. Father, the aunt and uncle visited together with D.N. twice in early July. D.N. cried during most of the visit, but the aunt and uncle were able to console him, and DCFS reported the visits were appropriate. Father was living with his mother, but looking for his own apartment. DCFS remained steadfast in its recommendation that Father be denied reunification services.

The jurisdictional/dispositional hearing began on July 22, 2009. Mother submitted on, and waived her right to challenge, the allegations of the petition. As Father

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[5] Other police reports attached to detention report reflect arrests in 1994 and 1995 for selling marijuana and drunk driving.

was a registered sex offender, DCFS proceeded pursuant to the statutory presumption created by section 355.1, which shifts to the parent the burden to produce evidence to rebut a prima facie showing that the child is presumed to fall within the statutory definition of section 300, and to be at substantial risk of neglect or abuse. (§ 355.1, subd. (d)(1), (4).)[6]

Father responded by arguing the allegations against him should be dismissed. He claimed DCFS had failed to establish the elements necessary to justify assertion of dependency court jurisdiction. He also argued that the allegations regarding his prior conduct lacked a nexus to any current risk to D.N. of serious physical or emotional harm, and were too remote in time. In addition, Father said he had regularly registered as a sex offender, and had satisfied this and other terms of his parole from which he expected to be discharged in early 2010.

In response, DCFS pointed out that Father's claim of consistent adherence to the terms of his parole had not always been true. He had been returned to prison numerous times for parole violations. Father has a history of sexual violence and a lengthy criminal record, which includes convictions for rape. Moreover, Father's history of violence is not remote; the instances of domestic violence against Mother occurred as recently as 2007, and there is no indication Father has taken steps to address his anger management problems or his proclivity towards violence.

As for the provision of reunification services, DCFS, joined by D.N.'s counsel, recommended the court deny those services to Father. Based on section 361.5, subdivision (b)(12), DCFS argued it was not in D.N.'s best interest to award Father reunification services, because of his conviction for a violent sexual offense. Father

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[6] Section 355.1 provides that, in a dependency action in which the child's parent "has been previously convicted of sexual abuse . . . or (4) is required, as the result of a felony conviction, to register as a sex offender . . . , that finding shall be prima facie evidence . . . that the . . . minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The prima facie evidence constitutes a presumption affecting the burden of producing evidence." (§ 355.1, subd. (d)(1), (4).)

argued that, under section 361.5, subdivision (c), the juvenile court retained the discretion to order reunification services, if it found by clear and convincing evidence that such services would be in D.N.'s best interest. DCFS replied that Father had been incarcerated for the majority of his adult life, had a lengthy history of parole violations and had only been out of prison a few months at present. Moreover, although Father was purportedly unaware of this dependency action when D.N. was born in October 2008, he was certainly aware of it no later than December 10, 2008. His first action was to request a paternity test. He failed to appear in court in December, even though DCFS told him to do so, and it was not until after the paternity test in April 2009 that Father took any steps to participate in D.N.'s life or this action.

With respect to disposition, Father requested that D.N. be moved from the home of his foster/prospective adoptive parents, and placed with his paternal aunt and uncle. Father conceded D.N. was bonded to the caregivers with whom he has lived since his birth. Nevertheless, he argued the relative preference of section 361.3, subdivision (c) should be honored, and that D.N. could adapt to a new placement with relatives. DCFS, again joined by D.N.'s counsel, argued that D.N. should remain, at least for the time being, with caregivers with whom he is clearly bonded.[7] DCFS also pointed out that its recommendation that Father be denied reunification services was not predicated on a single aged felony conviction. Rather, the recommendation is based on the "course of criminal conduct that has characterized" Father's life. DCFS requested that the court set the matter for a section 366.26 hearing.

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[7] D.N.'s attorney pointed out that the fact that D.N. remains in his current placement does not preclude an ongoing assessment of the paternal relatives. As the court later ordered, DCFS will continue to observe and assess the relationship between D.N. and his aunt and uncle and report and make recommendations to the court so it may determine if a placement with them is in the child's best interest. Moreover, D.N.'s attorney noted the infant requires asthma treatments twice daily. The paternal relatives will require training to administer those treatments, so it would not yet be appropriate to release the child to their care.

At the conclusion of the hearing the juvenile court sustained the petition. The court found Father was registered sex offender with a history of extreme violence, some quite recent. The court also found no indication that Father's lifelong propensity for violence "ha[d] been ameliorated." Reunification services were denied.

With respect to the child's placement, the juvenile court admonished Mother for failing to reveal the identity of the D.N.'s father until two months after the child's birth. The court also noted, however, that even after Father learned about this action and was instructed to come to court, he waited four months to do so. The juvenile court refused to remove D.N. from his current placement, found by clear and convincing evidence that D.N. could not be returned to either parent's custody or care, and set the matter for a section 366.26 hearing.

DISCUSSION

Father maintains the juvenile court erred in three principal respects:

(1) The court's jurisdictional findings are not supported by substantial evidence because (a) the presumption of jurisdiction under section 355.1, is unconstitutional as applied to him, (b) even if the presumption may constitutionally be applied here, he produced sufficient evidence to rebut it, and (c) there is insufficient evidence that D.N. would be subjected to a substantial risk of harm in Father's care;

(2) The court abused its discretion by denying him reunification services; and

(3) The court erred by refusing to place D.N. with his paternal relatives.

For reasons discussed below, we need not address all of Father's contentions. As to those we do discuss, none has merit.

1. The jurisdictional findings are supported by substantial evidence.[8]

Father contends the evidentiary presumption of section 355.1, subdivision (d), is unconstitutional as applied in this case because his conviction for a sexual offense 30 years ago is too remote to be relevant. Alternatively, he maintains that, even if the statutory presumption is arguably constitutional as applied to him, he has produced sufficient evidence to rebut the presumption and to prove he poses no risk of harm to his son. We will not address Father's initial constitutional argument. A fundamental principle of constitutional adjudication is that a court does not decide constitutional questions unless it is absolutely required to do so to dispose of the matter before the court. We will not reach constitutional questions where, as here, other grounds are available and dispositive of the issues of the case. (*Lyng v. Northwest. Indian Cemetery Prot. Assn.* (1988) 485 U.S. 439, 445, [108 S.Ct. 1319, 1323]; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230-231; *Matrixx Initiatives, Inc. v. Doe* (2006) 138 Cal.App.4th 872, 881.)

We need not address Father's alternative assertion. Even without applying any evidentiary presumption, we conclude the record contains not merely substantial, but overwhelming, evidence to support the jurisdictional findings.

The allegations against Father relate to a long history of troubling behavior patterns and conduct, including numerous violent confrontations between Father and others, including Mother. In 2006 and 2007, Father is alleged to have punched Mother in the face with his fists, knocked down the door to her house, and to have threatened to kill her with a gun. In addition to his domestic violence against Mother, Father was arrested after striking a woman while she was driving, and forcing her out of the car. Father

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[8] We recognize the petition need only contain allegations against one parent to support the exercise of the juvenile court's jurisdiction. The court takes jurisdiction over the child, not his parents; thus, the uncontested allegations sustained against Mother are sufficient to satisfy the jurisdictional basis for the petition. (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397; *In re Jeffrey P.* (1990) 218 Cal.App.3d 1548, 1553–1554.) However, should Father's challenge succeed, it could impact the reunification or placement orders. Accordingly, we address his claims.

began driving and striking the passenger, trying to push her out of the moving vehicle, and then chased and beat her when she did get out. Another time Father threatened to kill a man unless he let Father "have" a woman, and then threw a brick at him as the man walked away from the confrontation. And, although they occurred as long ago as 1981 and 1997, we cannot ignore Father's sordid history of repeated, extreme and violent sexual assaults, including a conviction for and accusations of rape, sodomy, and oral copulation, all involving force. One victim claimed Father raped her and burned her with cigarettes. Another accused Father of threatening to stab and shoot her unless she complied with his demands.

Ignoring the rest of his criminal history, Father maintains a myopic focus on the 30-year-old conviction for the sexual offenses which resulted in his legal duty to register as a sexual offender. He argues that aged conviction is insufficient evidence to substantiate a finding that he currently poses a substantial risk of harm to his son. He notes, correctly, that the policy in California has never been "Go to jail, lose your child." (See *In re Isayah C.* (2004) 118 Cal.App.4th 684, 696; *In re. O.S.* (2002) 102 Cal.App.4th 1402, 1410.) However, the serious risks posed to D.N. do not flow solely from Father's conviction for a sexual offense in 1981. Rather, as the juvenile court observed, they flow from a record replete with evidence demonstrating a disturbing and ongoing pattern of extreme violence, an inability to cope with anger, and a failure to obtain any "treatment to deal with these issues." These problems and issues unquestionably pose grave risks to D.N.'s emotional and physical health. (See *In re Heather A.* (1996) 52 Cal.App.4th 183, 194-195 [a child's exposure to domestic violence constitutes "secondary abuse"].)

Father has clearly made a laudable and genuine effort to establish and build a relationship with his son. But, it is equally clear that Father has exerted little, if any, effort to address the underlying issues that, throughout his adult life, have repeatedly caused him to turn to violence. Father claims he should be given the chance to prove his ability to parent. Unfortunately, there is only one legitimate response to this contention: "Children should not be required to wait until their parents grow up." (*In re Rikki D.*

(1991) 227 Cal.App.3d 1624, 1632, disapproved on another ground, by *In re Jesusa V.* (2004) 32 Cal.4th 588, 624, fn. 12.) Father has had a lifetime to learn to marshal and gain control of his emotions. D.N.'s right to a stable future need not be sacrificed to give Father a chance to get his own life in order and his emotions under control. The juvenile court acted within its discretion in deciding that reunification would not serve D.N.'s best interest.

2. The denial of reunification services was not an abuse of judicial discretion.

Father was denied reunification services under section 361.5, subdivision (b)(12), because he has been convicted of a violent felony under Penal Code section 667.5. Rape is defined as a violent felony by that statute. (See Pen. Code, §667.5, subd. (c)(3).)

Father does not argue section 361.5, subdivision (b)(12) is inapposite here. Rather, he maintains that, notwithstanding the statute's applicability, the juvenile court retained discretion to award him reunification services. He contends the juvenile court abused its discretion by refusing to award those services because the provision of services would serve D.N.'s best interests. That such services would serve D.N.'s interests is, in Father's view, evidenced by the fact that he and D.N. have established a bond, that reports of their interactions have all been positive, and his right to a chance to develop the positive relationship he has begun to establish with D.N.

The juvenile court concluded otherwise. It expressed "grave" concerns with both Father's historical and current issues. The court observed that Father has a lifelong history of extreme violence, and has made no showing that he has taken steps, or at least made any progress, in an effort to ameliorate those problems. The court noted that Father will need help to address his inability to manage anger and his violent nature, problems with which he will be forced to deal for many years. The court specifically addressed the argument raised by Father below and in his writ petition that, by denying reunification services, the court essentially declared that felons may never reunify with their children. The court soundly and properly rejected that argument. It noted, correctly, that "felons reunify with their children everyday . . . ." However, the particular circumstances of Father's criminal history are so disturbing, they constitute clear and convincing evidence

that, the court not only found, that reunification services were not in D.N.'s best interest, but it also found they would actually be "detrimental to the child." There must be some reasonable basis to believe that reunification is possible before the services will be provided to a parent to whom the court is not required to do so. (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464; *In re William B.* (2008) 163 Cal.App.4th 1220, 1228–1229.) Juvenile courts have broad discretion to determine whether the provision of reunification services will serve a child's best interests under section 361.5. (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 523.) Here, the juvenile court's comments confirm our reading of the record: Given Father's extremely volatile history, there is ample evidence to support the conclusion that the provision of reunification services would not be in D.N.'s best interests. We reverse a juvenile court's ruling denying reunification services only for an abuse of discretion. (*Id*. at pp. 523-524.) This record reveals no such abuse.

3. The trial court's decision not to give preference to a relative for placement was a proper exercise of discretion.

Father's final contention is that the juvenile court erred by deferring to DCFS with respect to the placement decision, rather than making an independent determination on the issue of whether placement with D.N.'s paternal relatives is appropriate. DCFS concedes that the juvenile court erred by failing to make required findings. (See § 361.3, subd. (e) [requiring court to state reasons when relative placement is denied].) DCFS maintains, however, that the court's error was harmless.

Section 361.3, requires that a child's relatives seeking to have a dependent child placed with them receive "preferential consideration," and be first in line as to consideration for which placement is appropriate for a child. (§ 361.3, subds. (a), (c)(1).) However, in this as in all determinations before the juvenile court, the pivotal determination is whether placement with a relative is in the child's best interests. (*In re Stephanie M*. (1994) 7 Cal.4th 295, 321; *Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 862–863.)

Here, D.N. was placed in foster care at the outset because his Mother failed to identify Father for several months after the child's birth. Then, Father himself waited several more months before stepping forward to assume a parental role, and even longer to request that D.N. be placed with his paternal aunt and uncle.[9] By the time of the disposition hearing in late July 2009, D.N. had been placed with his caretakers for all but a few days of his life, and had only had two visits—neither of which began smoothly—with his paternal relatives. The court refused to move D.N. to the relatives' home. It noted the numerous delays in the action caused by Mother's initial obfuscation and Father's failure to assume responsibility until paternity had been definitively established. The juvenile court stated that, had things been different, D.N. might have been placed with his paternal relatives at the outset. However, as a result of those delays, it claimed it lacked "the authority to weigh in on that placement situation at this time," and could not and would not remove D.N. from the home of his current caretakers and prospective adoptive parents.

Father's counsel pointed out that the law requires "that the court . . . exercise its independent judgment in determining whether relative placement is appropriate, and [was not free to] merely defer to the recommendations of" DCFS. The court responded that it "felt [it had] exercised independent judgment but not knowing these folks [the paternal relatives] and knowing they have just begun visiting . . . [it] felt it in the best interest of the child for [DCFS] to make that determination as to what was appropriate." In addition, the court stated that "if [it] were to exercise and make its own independent judgment given the bond that the child has at this point and given our knowledge of the caregivers who have an approved home study . . . . and legal permanency exist[s] for this child, the court will indicate that [D.N.] should remain as placed." The court ordered that additional information DCFS obtained as to whether D.N. should appropriately be placed with his paternal relatives be brought to its attention. At the request of Father's counsel,

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[9] The first mention of D.N.'s paternal relatives and their interest in caring for D.N. appears in DCFS's July 22, 2009 report.

the juvenile court ordered DCFS to prepare a supplemental report "addressing the appropriateness of the paternal aunt and uncle so that the court [could] make its own independent ruling based on that information." We review a juvenile court's custody placement order under the abuse of discretion standard; the court has wide discretion and its determination will not be disturbed absent a manifest showing of abuse. (*In re Alicia B.*, *supra*, 116 Cal.App.4th at p. 863.)

On this record we find the juvenile court satisfied the requirements of section 361.3, subdivision (e), and exercised appropriate and independent judgment to determine why it was not appropriate for D.N. to be moved into a placement with his paternal relatives. Although the juvenile court initially appeared to defer to DCFS on this issue, it later stated its own reasons for not disrupting the current placement. Those reasons include the excessive delay before Father and then his relatives came forward in this matter, the very tenuous nature of the nascent relationship between D.N. and those relatives (as contrasted to the strong bond D.N. shares with his long-term caretakers), and the court's intention that DCFS should continue to assess the relatives' situation and the relationship they have begun to build with D.N. On this record, we find no abuse of discretion and no grounds for reversal.

DISPOSITION

The petition is denied.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.